88-1680

Supreme Court, U.S.
FILED
APR 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

RIKKI VENEMON, CAROLINE CRAWFORD, ROBERT KEATING, MICHAEL BARNES, THOMAS HUFF, ROBERT BAXTER, and THE CITY OF PORTLAND, OREGON,

Petitioners,

v.

HARRY LOUIS DAVISON,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where the police have probable cause to arrest, and the person to be arrested resists their efforts to arrest him, can the force used by the police to effect the arrest shock the conscience, deprive the arrested person of his liberty without due process of law, and subject the police to liability under 42 USC § 1983, if there is no substantial physical injury to the arrested person?

2. Should the Court overrule Monroe v. Pape, 365 US 167 (1961), adopt instead the reasoning of Justice Frankfurter, id. at 202-58 (Frankfurter, J., dissenting), and hold that an action, which is unlawful under state law and for which the state provides a meaningful and adequate redress, is not undertaken under color of state authority and will not support a claim under 42 USC § 1983?

PARTIES TO THE PROCEEDING

All the parties to the proceeding in the court below are named in the caption of the case in this Court.

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REPORTS OF OPINIONS BELOW

Neither the opinion of the district court nor the decision of the court of appeals was reported. The opinion of the district court appears as Appendix A to this petition; the memorandum decision of the court of appeals appears as Appendix B; the order denying the petition for rehearing and the suggestion of rehearing en banc appears as Appendix C.

JURISDICTION OF THE SUPREME COURT

The court of appeals issued its memorandum disposition of this case on August 29, 1988. The order denying petitioner's petition for rehearing and rejecting the suggestion for rehearing en banc was filed January 4, 1989. This Court has jurisdiction under 28 USC § 1254(1) to review the judgment of the United States Court of Appeals for the Ninth Circuit by writ of certiorari. This petition is

timely under 28 USC § 2101 and under Rule 20.4 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case principally involves the provisions of the United States Constitution, Amend. XIV, and of 42 USC § 1983. These provisions are set forth in full, respectively, in Appendix D and Appendix E. The Oregon statutes under which plaintiff was stopped and arrested, ORS 801.325, 811.405 and 813.010, are set forth in full in Appendix F. The Oregon statutes defining the privileges of police officers to arrest and to use force, ORS 133.235, 133.310, 161.235, and 161.239 to 161.245, are set out in full in Appendix G.

STATEMENT OF THE CASE

On the evening of September 3, 1984, petitioner Rikki Venemon, a City of Portland police officer, arrested

respondent Harry Davison for driving while intoxicated.[1] When respondent refused to be handcuffed and taken into custody, Officer Venemon called for backup. Petitioners Caroline Crawford, Robert Keating, Michael Barnes, Thomas Huff and Robert Baxter responded and went to the scene of the arrest. Respondent was taken to the ground and handcuffed, and was taken to the police station.

Respondent claimed that, in the course of the arrest, he was grabbed by the throat without warning, that his arm was grabbed and twisted behind him, that he was thrown to the sidewalk, that his hair was pulled

---

[1] The Ninth Circuit held that the stop and arrest of Mr. Davison were lawful, and affirmed the summary judgment in favor of petitioners on those issues. App-18 to App-23. The facts leading up to the arrest are stated in the court's memorandum. App-15 to App-16.

and his face pushed into the sidewalk, and that someone kicked his side.

Respondent's breathalyzer test showed no alcohol in his blood. He was cited for the traffic infraction of failing to signal with lights, ORS 811.405, and for the crime of resisting arrest, and he was released. He was convicted of the infraction, but not of resisting arrest.

Immediately after his release, respondent visited two local hospital emergency rooms, complaining of minor injuries and seeking further blood alcohol tests. Respondent sought no further treatment.

Respondent sued petitioners in the United States District Court for the District of Oregon under 42 USC § 1983. He claimed that the petitioners deprived him of his liberty without due process of law because the arrest was unlawful and because

the force used was excessive and unreasonable. The district court had subject matter jurisdiction under 28 USC § 1343. Respondent also asserted pendent claims under state law theories of assault and battery, abuse of process and false imprisonment.

The district court granted petitioners' motion for summary judgment. The court held that the stop and arrest were founded on probable cause, that the force used did not violate respondent's constitutional rights, and that, in the absence of any remaining federal claim, the court would not exercise pendent jurisdiction over Davison's claims under state law.

Respondent appealed. The Ninth Circuit affirmed the summary judgment on the stop and arrest issues, but reversed on respondent's claim that the force used

violated his constitutional rights. Petitioners' petition for rehearing was denied and their suggestion of appropriateness of rehearing en banc was rejected by order of January 4, 1989.

REASONS FOR ALLOWING THE WRIT

The Court should allow the writ as to the first question presented because the Ninth Circuit has rendered a decision in conflict with a decision of the Fifth Circuit on the same matter. Johnson v. Moral, 843 F2d 846, 847 (5th Cir 1988) (petition for rehearing en banc granted). See Rule 17.1(a).

In Johnson v. Moral, Johnson did not contest the validity of his arrest by Moral. Id. at 847 n. 1.

> During the arrest, Johnson was calm and did not resist Moral. Moral, however, was aggressive and hostile, insulting the plaintiff, forcing him to "spread eagle" against the car, and searching him roughly. In addition, he handcuffed the plaintiff too tightly and his

> jerking on the handcuffs caused them to cut Johnson's wrists. Although these cuts were not severe and Mr. Johnson sought no medical attention for them, they did bleed and leave a permanent scar.

Id. at 847. The court affirmed the summary judgment for defendant on the ground that there was no severe injury. Id. at 847-48.

In this case, the parties agreed that the appropriate standard for recovery is that enumerated by the Ninth Circuit in Rutherford v. City of Berkeley, 780 F2d 1444 (9th Cir 1986). The question is not merely whether the arrest could have been accomplished with less force. Rather, it is whether defendants' "conduct 'shocks the conscience' or constitutes force that is 'brutal' and offends 'even hardened sensibilities.'" Id. at 1446, quoting in part Rochin v. California, 342 US 164, 172-73 (1952).

> [I]n determining whether the constitutional line has been crossed, a court must look to

> such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.

Rutherford v. City of Berkeley, 780 F2d at 1446, quoting Johnson v. Glick, 481 F2d 1028, 1033 (2nd Cir), cert denied 414 US 1033 (1973).

This standard is the same as that adopted by the Fifth Circuit in Shillingford v. Holmes, 634 F2d 263 (5th Cir 1981), and applied in Johnson v. Moral, 843 F2d 846 (5th Cir 1988) (rehearing en banc granted). The principal difference between Johnson and this case, on the one hand, and Rutherford, and, for that matter, Shillingford, on the other, is that in the latter two cases there was no reason to arrest the plaintiffs, and, therefore, no

justification for the use of any force. The clearly excessive reactions of the police officers in those cases could be seen as irrational, brutal and offensive.

In this case, however, as in Johnson v. Moral, the arrest of the plaintiff was valid. In this case, respondent has consistently admitted that he refused to be handcuffed and taken into custody. Clearly, the privilege to arrest carries with it the privilege to use such force as may reasonably be necessary to accomplish the arrest. See, e.g., ORS 133.235(4).

"Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." Johnson v. Glick, 481 F2d at 1033. As the Ninth Circuit has said, only "conduct that can be fairly characterized as 'intentional, unjustified, brutal and offensive to human dignity'

violates the victim's right to substantive due process." Rutherford v. City of Berkeley, 780 F2d at 1446, quoting in part Meredith v. State of Arizona, 523 F2d 481, 484 (9th Cir 1975).

If this concept is to be anything more than a ritualistic incantation, it must mean that, where some use of force is privileged, the use of force is not brutal or offensive to human dignity, in violation of the Constitution of the United States, unless it results in substantial injury to the victim. To hold otherwise would be to ignore the admonition from this Court that the drafters did not intend to "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." Paul v. Davis, 424 US 693, 701 (1976). Accord Daniels v. Williams, 474 US 327, 332

(1986); Parratt v. Taylor, 451 US 527, 544 (1981).

The Ninth Circuit's decision in this case also appears to conflict with two decisions of the Fourth Circuit, reviews of which are pending before this Court. Justice v. Dennis, 834 F2d 380 (4th Cir 1987), cert filed 56 USLW 3626 (1988); Graham v. City of Charlotte, 827 F2d 945 (4th Cir 1987), cert granted sub nom Graham v. Connor, ____ US ____, 102 L Ed2d 32 (1988).

In Justice v. Dennis, the Fourth Circuit affirmed the giving of a jury instruction containing the following language:

> The force used by the officer is unconstitutionally excessive if the officer used a means so brutal, demeaning and harmful as literally to shock to conscience of a court.
>
> You must determine whether the force applied caused injury so severe, was so disproportionate to the need

> presented and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal or inhumane abuse of official power literally shocking to the conscience.

834 F2d at 382. The court explained:

> Courts, including our own, have experienced some difficulty in defining the scope of liability for excessive force as a constitutional tort under section 1983. The dilemma has been complicated by the fact that claims of excessive force may arise in the context of the fourth, eighth, or as in this instance, the fifth amendment. Subtle efforts at distinction are, therefore, common in cases in this area.
>
> There are, nevertheless, certain basic principles in section 1983 jurisprudence as it relates to claims of excessive force that are beyond question. Whether the factual circumstances involve an arrestee, a pretrial detainee or a prisoner, it is clear that the agents of the state are permitted to exercise a certain degree of force in order to protect the interests of society. While liability may be assessed under section 1983 when the limits of privileged force are exceeded, the threshold for that liability must be higher than that set for a normal tort

> action. To allow otherwise would offend the Supreme Court's repeated determination that the due process clause is not intended to superimpose a "font of tort law" upon whatever systems may already be administered by the state.

Id. (Citations omitted).

The Fourth Circuit applied the same test in affirming a directed verdict in favor of the defendants in Graham v. City of Charlotte, 827 F2d at 948-50. This Court granted certiorari in that case to decide whether a plaintiff who asserts a claim under 42 USC § 1983 for a Fourth Amendment violation arising from allegations of excessive force must establish that the police acted "maliciously and sadistically for the very purpose of causing harm." 57 USLW 3270.

Petitioner has discovered only two cases in which this Court has addressed specifically the issue of the constitutional ramifications of force used

by police officers in the course of effecting an arrest. In Brower v. County of Inyo, ____ US ____, 57 USLW 4321 (1989), the Court held that the use of a roadblock "designed to produce a stop by physical impact if voluntary compliance does not occur" constituted a seizure under the Fourth Amendment, and that the petitioners could make out a claim for an unreasonable seizure under 42 USC § 1983 "only because the unreasonableness they allege consists precisely of setting up the roadblock in such manner as to be likely to kill [Brower]." 57 USLW at 4323.

In Tennessee v. Garner, 471 US 1, 11 (1985), the Court held a Tennessee statute "unconstitutional insofar as it authorizes the use of deadly force against [unarmed, nondangerous] fleeing suspects." In contrast to this case, Brower v. County of Inyo, and Tennessee v. Garner involved the

use of force resulting in death, and claims asserted for violations of the Fourth Amendment. The Court has never addressed the question presented by this case, i.e., whether, where there is probable cause to arrest and the person to be arrested refuses to comply, force used by the police to effect the arrest, which does not result in serious injury to the arrested person, can deprive the arrested person of his liberty without due process of law, in violation of the Fourteenth Amendment, and subject the police to liability under 42 USC § 1983. This is an important question of federal law which should be settled by this Court. See Rule 17.1(c).

> As Sir Arthur Sullivan observed a century ago, a policeman's lot is not a happy one. By the very nature of their calling they are daily confronted with unpleasant situations and unpleasant people. Required to enforce the law, police officers must confront persons who have chosen not to obey the law. Required to maintain the peace,

police officers are thrust into the midst of persons who have chosen to disturb the peace. Required to maintain order, police officers must deal with persons who choose to be disorderly. Required to protect life, liberty and property, police officers must arrest those who have destroyed life, who have trampled on the liberty of others, and who have been guilty of thievery.

These difficulties with which policemen are faced are not abstract. They are real. They are face to face and flesh and blood. The confrontation is between real people who are sworn to uphold the law and real people who have or may have violated the law. As human beings, police officers are subject to fear, misjudgment, error and overreaction. Also, lamentably, they may occasionally be seized by brutality, arrogance and maliciousness.

Overlaying all the difficulties of police officers is a pervading sense among substantial segments of the community that police officers are always brutal, arrogant and malicious. This twisted view of police officers exacerbates the already raw point of contact between policeman and citizen. It is not surprising, under these circumstances, that even the best of police officers sometimes

> incur the resentment and wrath of those with whom they must deal. Now, all too often, this resentment finds release by filing suit against the police officer by the disaffected citizen.

Burley v. Rada, 456 F Supp 1095, 1096-97 (ED Va 1978).

This Court has warned against the "unwarranted intrusion by the federal judiciary into the discretionary authority committed to [police officials] by State and local law to perform their official functions." Rizzo v. Goode, 423 US 362, 366 (1976). "To be sure, federal-court intervention in the daily operation of a large city's police department . . . is undesirable and to be avoided if at all possible." Id. at 381 (Blackmun, J., dissenting). Just as "false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official," Baker v.

McCollan, 443 US 137, 146 (1979), battery does not become a constitutional violation merely because it is alleged to have been committed by police officers in the course of effecting an arrest.

In order to harmonize the decisions of this Court and those of the circuits, and to give meaning to the constitutional limitation on the power of the federal government and on the jurisdiction of the federal courts, the Court should grant this writ, and should hold that the use of force by police officers to effect an arrest, based on probable cause, of a noncomplying subject, in the absence of deadly force or serious physical injury, does not implicate the Constitution or laws of the United States and will not support a claim under 42 USC § 1983.

The Court should grant the writ as to the second question presented because it

involves an important question of federal law which should be settled by this Court because it can be settled only by this Court. See Rule 17.1(c).

As we have seen, supra, it is neither within the contemplation of the Constitution, in establishing the federal judicial power in article III, nor within the power or intent of Congress, in enacting the Civil Rights Act now codified at 42 USC § 1983, to create "a font of tort law to be superimposed upon whatever systems may already be administered by the States." Paul v. Davis, 424 US 693, 701 (1976). Rather, the purposes of this statute are to override unconstitutional state laws, to provide a federal remedy where state law is inadequate to protect citizens' rights, and to provide a federal remedy where the state remedy, though adequate in theory, is not available in

practice. Monroe v. Pape, 365 US 167, 173-74 (1961), overruled in part on other grounds, Monell v. New York Dept. of Soc. Services, 436 US 658, 663 (1978).

In light of the purposes intended to be served by the creation of this federal remedy, it is time to reexamine the allegation that petitioners acted under color of state law. It has not been alleged, and it cannot seriously be contended, that the Constitution and laws of the State of Oregon provide respondent, either in theory or in practice, less protection of his individual rights than he is entitled to under federal law. Therefore, it must be asked how respondent can be deprived of his federally protected rights "under color of" state law. Although this Court, in Monroe v. Pape, 365 US at 172-87, held that an action, illegal and redressable under state law, can

nonetheless be committed under color of state law, the time has come to reexamine the statute and interpret it according to its clear meaning. See Monroe v. Pape, 365 US at 202-58 (Frankfurter, J., dissenting).

The logical flip-side of identifying the purpose of 42 USC § 1983 as providing a federal remedy in federal court when the states were unwilling or unable to protect the constitutional rights of their citizens is that the statute was not intended to reach situations in which the states are ready, willing and able to enforce the constitutional rights of their citizens. This was the view propounded by Justice Frankfurter, based on the plain language of the statute and upon the legislative history:

> [A]ll the evidence converges to the conclusion that Congress . . . created a civil liability enforceable in the federal courts only in instances of injury for which redress was barred in the state courts because some

> "statute, ordinance, regulation, custom, or usage" sanctioned the grievance complained of. This purpose, manifested even by the so-called "Radical" Reconstruction Congress in 1871, accords with the presuppositions of our federal system. The jurisdiction which Article 3 of the Constitution conferred on the national judiciary reflected the assumption that the state courts, not the federal courts, would remain the primary guardians of that fundamental security of person and property which the long evolution of the common law had secured to one individual as against other individuals. The Fourteenth Amendment did not alter this basic aspect of our federalism.

365 US at 237 (Frankfurter, J., dissenting)(footnote omitted).

Nonetheless, the Court adopted the broad view it had expressed in United States v. Classic, 313 US 299, 326 (1941): "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." Quoted in Monroe v. Pape,

365 US at 184. In so doing, the Court opened the floodgates of litigation which has deluged the federal courts and has subjected every encounter between state and local governments and their citizens to scrutiny under the federal Constitution.

Recent cases have demonstrated the Court's concern over the apparent trivialization of the Constitution. Daniels v. Williams, 474 US at 332 ("To hold that injury caused by [negligent] conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law."); Parratt v. Taylor, 451 US at 544 ("To accept respondent's argument . . . would almost necessarily result in turning every alleged injury which may have been inflicted under 'color of law' into a violation of the Fourteenth Amendment cognizable under 42 USC §

1983."); Baker v. McCollan, 443 US at 145 ("The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every person acquitted - indeed, for every suspect released."); Estelle v. Gamble, 429 US 97, 106 (1976)("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."); Paul v. Davis, 424 US at 699 ("Respondent's construction would seem almost necessarily result in every legally cognizable injury . . . establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result . . .").

The subjection of all actions by state and local government officials to challenge

under 42 USC § 1983 was a natural and predictable result of the Court's expansion in Monroe v. Pape, of the concept of color of state law beyond that which Congress intended in enacting the statute:

> Indeed, its precise limitation to acts "under color" of state statute, ordinance or other authority appears on its face designed to leave all questions of the nature and extent of liability of individuals to the laws of the several States except when a State seeks to shield those individuals under the special barrier of state authority. To extend Civil Rights Act liability beyond that point is to interfere in areas of state policymaking where Congress has not determined to interfere.
>
> Nor will such interference be negligible. One argument urged in Screws in favor of the result which that case reached was the announced policy of self-restraint of the Department of Justice in the prosecution of cases under 18 USC § 242. See 325 US, at 159, 160. Experience indicates that private litigants cannot be expected to show the same consideration for the autonomy of local administration which the Department purportedly shows.

365 US at 239-40 (Frankfurter, J., dissenting)(Footnote omitted). In retrospect, Justice Frankfurter was right.

Even though this question is one of statutory construction, the Court should not feel constrained by the doctrine of stare decisis from correcting its erroneous interpretation. The doctrine is judicially created and is not inflexible.

Hertz v. Woodman, 218 US 205, 212 (1910).

> The issue in the present case concerns directly a basic problem of American federalism: the relation of the Nation to the States in the critically important sphere of municipal law administration. In this aspect, it has significance approximating constitutional dimension. Necessarily, the construction of the Civil Rights Acts raises issues fundamental to our institutions. This imposes on this Court a corresponding obligation to exercise its power within the fair limits of its judicial discretion. "We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to

> satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable . . . ."

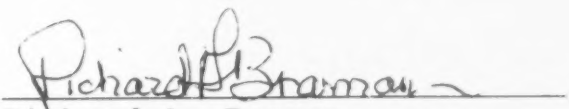
Monroe v. Pape, 365 US at 222 (Frankfurter, J., dissenting)(Quoting Helverson v. Hallock, 309 US 106, 119 (1940)).

Experience has demonstrated that the Court's interpretation of the term "under color of [law]" was incorrect and that it has led to an unwarranted and unintended burden to the federal courts to intervene in the affairs of the states. The Court should grant the writ, take a fresh look at the fundamental language and purpose of 42 USC § 1983 and hold that, if a state is ready, willing and able to redress conduct alleged to have been wrongful, that conduct, if in fact wrongful, is not pursued under color of state law and will not support a claim under 42 USC § 1983.

CONCLUSION

The Court should grant the petition for a writ of certiorari on both questions presented. The Court should reverse the judgment of the Ninth Circuit and should affirm the judgment of the district court.

Respectfully submitted,



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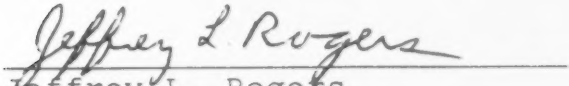

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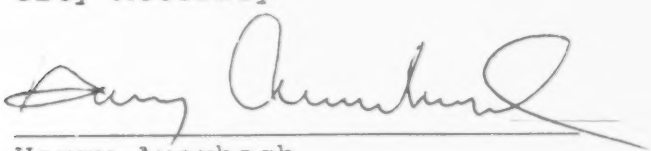

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HARRY L. DAVISON, Plaintiff, v. RIKKI VENEMON; CAROLINE CRAWFORD; ROBERT KEATING; MICHAEL BARNES; THOMAS HUFF; ROBERT BAXTER, individually and in his/her capacity as a police officer of the City of Portland; CITY OF PORTLAND, Defendants.	)	Civil No. 86-1127-FR ORDER

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FRYE, Judge:

Plaintiff, Harry Louis Davison, brings this action under 42 U.S.C. §§ 1983 and 1988, alleging that he was deprived of federally protected constitutional rights by defendants, police officers of the City of Portland and the City of Portland. All defendants move the court for summary Judgment in their favor pursuant to Fed. R. Civ. P. 56.

UNDISPUTED FACTS

On September 3, 1984, at approximately 10:30 p.m., Davison left a restaurant/bar in downtown Portland, walked to his parked car, and drove away. Defendant Rikki Venemon, who had watched Davison exit the restaurant/bar, observed Davison make a right-hand turn without using electric turn indicators.

Venemon activated the patrol car's overhead lights thereby signaling Davison

to stop. Davison stopped immediately, rolled down his window, and volunteered that he knew he had a defective turn signal, but that he had signaled with his arm. Venemon asked for Davison's driver's license and told him that arm signals cannot be lawfully used at night.

During the course of the conversation, Venemon noticed the smell of alcohol on Davison's breath and asked him to step from the car to take some sobriety tests. Davison consented and exited his car. Davison failed the sobriety tests. Venemon then told Davison that he was under arrest for driving while intoxicated. Davison protested, and Venemon told him that she was going to handcuff him and take him to the Traffic Division for breath tests. Davison refused to be handcuffed. Venemon then radioed for assistance. After several other officers had arrived, he was wrestled

to the ground and placed in handcuffs. Davison was taken to Traffic Division where he scored 0.00 on two breath tests, was issued citations for improper right turn and resisting arrest, and released. Davison was subsequently found guilty of making an improper right turn.

APPLICABLE LAW

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P 56(c). The moving party is entitled to a judgment as a matter of law if the nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. Cellotex Corp. v

Catrett, _____ U.S._____, 106 S.Ct. 2548, 2553 (1986). However, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. Id. Summary judgment will not lie if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for a nonmoving party. Anderson v. Liberty Lobby, Inc., _____ U.S._____, 106 S.Ct. 2505, 2507 (1986).

ANALYSIS AND RULING

42 U.S.C. § 1983 provides a civil cause of action for deprivations of federally protected rights caused by persons acting under color of state law.

In this case, the parties do not dispute that as a police officer Venemon was acting under color of state law. The question before this court is whether as a

matter of law Venemon's actions did not deprive Davison of federally protected constitutional rights.

Davison's second amended complaint alleges that he was deprived of the following constitutional rights:

a. Freedom from false arrest;

b. Freedom from false accusation;

c. Freedom from the use of excessive force;

d. Freedom from false imprisonment;

e. Freedom from summary punishments; and

f. Freedom from the deprivation of liberty interests without the due process of law.

Davison contends that he was deprived of these rights because 1) there was no valid reason to detain and arrest him for driving under the influence of intoxicants, and 2) the police officers used excessive and

unreasonable force in arresting him. Davison also alleges that the officers conspired to deprive him of these rights.

A. Detention and Arrest

Under Oregon law, a police officer may stop and detain a person for a traffic infraction for the purposes of investigation reasonably related to the traffic infraction, identification, and the issuance of a citation. O.R.S. 810.410(3)(b). The police officer may then arrest that person if he/she has probable cause to believe that the person was driving under the influence of intoxicants. O.R.S. 133.310(1)(e). Probable cause requires "a substantial objective basis for believing that more likely than not an offense has been committed and the person to be arrested has committed it." O.R.S. 131.005(11).

Davison argues that 1) any inquiry or investigation by Venemon unrelated to the traffic infraction was improper, and that 2) Davison's admission that he had had two or three drinks is inadmissible as evidence supporting Venemon's belief that Davison was driving under the influence of intoxicants. Davison argues that Venemon did not have probable cause to arrest him for driving under the influence of intoxicants, and any action taken to further the arrest was in violation of his constitutional rights.

Venemon's stop of Davison for an improper turn was legal. During Venemon's conversation with Davison regarding the defective signal, she noticed the odor of alcohol on Davison's breath. Davison then consented to a field sobriety test, which he failed. The fact that Venemon smelled the odor of alcohol breath and the fact

that Davison failed the field sobriety test supplies the substantial objective basis for Venemon's belief that, more likely than not, Davison was driving under the influence of intoxicants. Further, when Davison refused to be handcuffed, Venemon had probable cause to arrest him for resisting arrest.

Viewing the undisputed facts of this case in the light most favorable to Davison, the court finds that as a matter of law his detention and arrest were lawful. Consequently, Davison was not deprived of his constitutional right with regard to his arrest and detention.

B. Excessive Force

Under Oregon law, a police officer is authorized and justified in using physical force to effect an arrest. O.R.S. 161.235; Gigler v. City of Klamath Falls, 21 Or. App. 753, 763 (1975). In addition,

officers are presumed to be acting in good faith in determining the amount of force necessary to make the arrest. Rich v. Cooper, 234 Or. 300, 309 (1963). In determining whether the force used was reasonable as a matter of law in the context of Davison's efforts to resist arrest, the court will consider the following factors:

> [T]he need for application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted and whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973); Meredith v. State of Arizona, 523 F.2d 481 (9th Cir. 1975) (adopting the analysis of Johnson and stating that conduct which can be fairly characterized as intentional, unjustified, brutal and offensive to human dignity violates

victim's constitutional rights; see, e.g., Hinshaw v. Doffer, 785 F.2d 1260 (5th Cir. 1986) (to prevail on a section 1983 excessive force claim, a plaintiff must prove 1) severe injury, 2) grossly disproportionate action vis-a-vis the need, and 3) malice).

In this case, Davison refused to be handcuffed, thereby making it necessary for the police to physically control him. While Davison states that he was choked around the neck, pulled by the hair, and had his arm twisted behind his back, a reasonable trier of fact could not conclude that the officer's actions were brutal and offensive to human dignity in light of Davison's admitted resistance to arrest. The only evidence of injury is Davison's subjective complaints of arm and neck pain unsubstantiated by medical reports. Finally, there is no evidence that the

police officers acted maliciously or sadistically and for the sole purpose of causing harm to Davison.

Viewing the evidence in the light most favorable to Davison, a reasonable trier of fact could only conclude that the police officers' use of force was reasonably necessary to effectuate his arrest and did not violate Davison's constitutional right to be free from the use of excessive force. In addition, absent evidence establishing that the use of force was intended to punish, the court finds that Davison's constitutional right to be free from summary punishment was not violated.

Since the court has determined as a matter of law that Davison's arrest was lawful and accomplished without excessive force, Davison's allegations of conspiracy and deprivation without due process of law must fail. Similarly, since Davison has

not demonstrated that he was deprived of any constitutional rights, his complaint against the City of Portland alleging a pattern or practice of unconstitutional detentions and use of excessive force must fail. Without any federal claims, this court declines to exercise pendent jurisdiction over Davison's state claims.

The defendants' motion for summary judgment is granted.

DATED this 30 day of April, 1987.

/s/
Helen J. Frye
United States District Judge

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed August 29, 1988

HARRY L. DAVISON,	)	No. 87-3910
	)	
Plaintiff-Appellant,	)	D.C. No. CV 86-1127-FR
	)	
v.	)	
	)	
RIKKI VENEMON; CAROLINE CRAWFORD; ROBERT KEATING; MICHAEL BARNES; THOMAS HUFF; ROBERT BAXTER, individually and in his/her capacity as a police officer of the City of Portland; CITY OF PORTLAND,	)	MEMORANDUM*
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and Submitted July 11, 1988
Portland, Oregon

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: GOODWIN, Chief Judge, ALARCON and FERGUSON, Circuit Judges.

Plaintiff Harry Davisor appeals a summary judgment in an action brought under 42 U.S.C. § 1983 (1982), against several Portland police officers and the City of Portland. We affirm in part, and reverse in part.

On September 3, 1984, Officer Rikki Venemon stopped Davison for making a right hand turn without activating a turn signal. When Officer Venemon approached the vehicle, Davison volunteered that his turn signal was not working and that he used the appropriate hand signal instead. Venemon informed him that hand signals were not allowed after dark.

During the course of the conversation, Officer Venemon asserts that she smelled alcohol on Davison's breath. She asked how much he had had to drink. Davison admitted to having had two or three drinks. She

asked him to get out of the vehicle. Davison complied, but tried to explain the use of his hand signal.

Venemon asked Davison to perform several field sobriety tests. Instead of completing the tests, Davison continued to try to explain that he was not drunk. Officer Venemon then advised Davison that she was placing him under arrest for "driving while intoxicated." Davison protested that he was sober. The officer told Davison to put his hands behind his back so that she could handcuff him. Instead, he tried to reason with her. Venemon responded, "you'll do it my way or you'll find your face in the concrete."

Davison continued to try to reason with Venemon, but did not threaten her. She radioed for assistance. Davison states that suddenly, without warning, he was grabbed by the throat. Someone also —

grabbed his arm and twisted it behind him. He was thrown to the sidewalk, his hair was pulled and his face was pushed into the sidewalk. Someone kicked his side. He was handcuffed, and shoved into the patrol car.

At the police station, Davison was twice administered a breathalyzer test by another officer. Both registered 0.00 -- no alcohol in the blood stream. Davison was held for an hour, and cited for resisting arrest and for making an improper right hand turn. After being taken by taxi back to his car, he drove to a hospital where he was examined for injury to his neck, wrists and pain in the back of his head.

He was subsequently found guilty of making an improper right turn, but was not convicted of resisting arrest.

This court reviews de novo a grant of summary judgment. Summary judgment is

appropriate only if the pleadings and supporting material, read in the light most favorable to the nonmoving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see Kaiser Cement Corp. v. Fischbach and Moore, Inc., 793 F.2d 1100, 1103 (9th Cir.), cert. denied, 107 S. Ct. 435 (1986).

For the purposes of this appeal we assume that Davison is prepared to prove his version of facts regarding the lawfulness of the stop, probable cause to arrest and the use of excessive force.

A. The Lawfulness of the Stop

Davison contends that the initial stop of his vehicle was unlawful, and thus, that the stop deprived him of his right to be free from unlawful detention. This contention is wrong.

Traffic infractions constitute criminal conduct which is sufficient to support a brief investigatory stop. United States v. Fouche, 776 F.2d 1398, 1403 (9th Cir. 1985), citing Delaware v. Prouse, 440 U.S. 648, 661 (1979). Officer Venemon claims that she pulled Davison over for failing to use signal lights before making a right hand turn and for an improper lane change after the turn was made.

Under Oregon law, hand signals cannot be used to substitute for signal lights "[d]uring limited visibility conditions." Or. Rev. Stat. § 811.405(1)(a). Oregon defines "[a]ny time from sunset to sunrise" as a "[l]imited visibility condition." Or. Rev. Stat. § 801.325(1). Davison admits, in his affidavit, that when he left the bar, "[t]he sun was down and it was dark."

There is no material dispute on the failure to signal. Since this alone would

support the stop, summary judgment on this issue was appropriate.

B. Probable Cause to Arrest

Arrests without probable cause give rise to a cause of action for damages under § 1983. McKenzie v. Lamb, 738 F.2d 1005, 1008 (9th Cir. 1984); see Or. Rev. Stat. 133.310(1)(e) (peace officer may arrest a person if the officer has probable cause to believe that that person has committed the offense of Driving Under the Influence of Intoxicants). Probable cause does not require conclusive evidence of guilt, but only "some objective evidence which would allow a reasonable officer to deduce that a particular individual has committed or is in the process of committing a criminal offense." McKenzie, 738 F.2d at 1008. Venemon claims that she smelled alcohol on Davison's breath when she approached him to

discuss the traffic infraction[1] Davison admitted that he had had two or three drinks. Venemon asked Davison to perform sobriety tests which Davison admits that he failed.

Davison argues that he demonstrated quick responses inconsistent with being under the influence (e.g., use of a hand signal, and pulling over almost immediately after Venemon turned on her lights). Further, he attempts to discount his failure of the sobriety tests by asserting that his failure was due to his attempt to reason with the officer rather than to perform the tests successfully. (He ignores, however, the impact of his attitude toward the officer as evidence of possible inebriation.) He offers the

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[1]Although Davison, in his brief, denies that alcohol would have been on his breath, he did not make such a denial in his affidavit.

breathalyzer, tests which showed no alcohol in the bloodstream, as evidence that his failure to perform the field tests were not due to intoxication.

However, Davison's alternative explanation of the circumstances, which in retrospect may be true, does not vitiate the existence of probable cause to arrest Davison under the facts known to Venemon at the time she acted. See Baker v. McCollan, 443 U.S. 137, 145-46 (1979) ("The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted -- indeed, for every suspect released."). Even taking the evidence in the light most favorable to Davison, a rational trier of fact could not find that Officer Venemon lacked objective evidence sufficient to reasonably conclude that Davison was driving while intoxicated.

See McKenzie, 738 F.2d at 1008. Thus, summary judgment was also appropriate on this issue.

C. Excessive Force

Finally, Davison claims that the officers used excessive force when they arrested him. In determining whether the use of force violated Davison's constitutional rights, the question is whether the facts as alleged would permit a jury to find that the defendants' "conduct 'shocks the conscience' or constitutes force that is 'brutal' and offends 'even hardened sensibilities.'" Rutherford v. City of Berkeley, 780 F.2d 1444, 1446 (9th Cir. 1986), quoting Rochin v. California, 342 U.S. 165, 172-73 (1952).

> [A] court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain and restore discipline

> or maliciously and sadistically for the very purpose of causing harm.

Id., quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973).

Taking the evidence in the light most favorable to Davison, these factors weigh in Davison's favor and against summary judgment. Although Davison has admitted to forensic resistance of arrest, he states he did so only to the extent that he continued to attempt to reason with the officer and to convince her that there was no need to arrest him. He claims that he did not advance towards Venemon, nor move away from her, and that he made no physical gestures towards her. These assertions tend to show that he could have been subdued without the use of the force described in his complaint.

Davison claims that he was grabbed by the throat, that his arm was twisted behind him and that he was thrown to the sidewalk. He further asserts that his hair was pulled and his face pushed into the concrete sidewalk, and that he was kicked in the side. Even assuming that some force was needed to restrain Davison, although the record does not so indicate, thus justifying the grab of his throat, the arm twisting and hair pulling, and perhaps even taking Davison to the ground, there seems to have been no reason to further assault him. A jury could find that the kicking and pushing his face into the sidewalk were gratuitous.

The extent of the injury appears slight. Davison states only that he complained to the doctors at the hospital about "a sore neck and arm," sore wrists, "and pain in the back of my head."

Nonetheless, this court has not found in similar cases that the fact that a plaintiff suffered only slight injury alone entitles a defendant to summary judgment. See Rutherford, 780 F.2d at 1446 (finding that the plaintiff had met his burden on a motion for directed verdict against him by showing that several police officers threw him to the ground and punched and kicked him, without commenting on the extent of the injury). See also Gregory v. Thompson, 500 F.2d 59, 61-62 (9th Cir. 1974) (holding sufficient a complaint alleging that in response to plaintiff's statement that defendant justice of the peace would have to throw plaintiff out of the courtroom to make him leave, defendant threw plaintiff to the floor, jumped on him and beat him).

The final factor is whether the defendants used force in good faith in an effort to maintain order, or did so

maliciously or sadistically. In Allison v. Wilson, 434 F.2d 646 (9th Cir. 1970), cert. denied, 404 U.S. 863 (1971), this court held that a prisoner's allegation that a guard, "after saying 'I will show you some new rules' slammed a steel door shut, hitting Allison on the back, is a sufficient allegation of intentional misconduct." Id. at 647-48. In this case, Officer Venemon stated, "you'll do it my way or you'll find your face in the concrete." Under Allison, this statement is sufficient to show that the defendants' subsequent actions, including throwing him to the ground, pushing his face into the concrete and kicking him were an intentional attempt to inflict injury, rather than a good faith attempt to restrain him.

Weighing all the factors, we find that Davison alleged sufficient facts in his

affidavit to allow a rational trier of fact to conclude that the defendants used excessive force on him. Thus, summary judgment was inappropriate.

The order granting summary judgment on the issues relating to the stop, and probable cause to arrest are AFFIRMED. The order granting summary judgment on the excessive force count is REVERSED, and that count is REMANDED for trial.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed January 4, 1989

HARRY L. DAVISON,	)	No. 87-3910
	)	
Plaintiff-Appellant,	)	D.C. No. CV
	)	86-1127-FR
v.	)	
	)	
RIKKI VENEMON; CAROLINE CRAWFORD; ROBERT KEATING; MICHAEL BARNES; THOMAS HUFF; ROBERT BAXTER, individually and in his/her capacity as a police officer of the City of Portland; CITY OF PORTLAND,	)	ORDER
	)	
Defendants-Appellees.	)	

Before: GOODWIN, Chief Judge, ALARCON and FERGUSON, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Goodwin and Alarcon have voted to reject the suggestion for a rehearing en banc, and Judge Ferguson would so recommend.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Apportionment of representatives. Representatives shall be apportioned among the several States according to their respective numbers,

counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. Persons disqualified from holding office. No person shall be a Senator or Representative in Congress, or

elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. Validity of public debt. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall be not questioned. But neither the United States

nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. Enforcement. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX E

42 USC § 1983

42 § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX F

Oregon Revised Statutes

801.325 "Limited visibility condition." "Limited visibility condition" means:

(1) Any time from sunset to sunrise; and

(2) Any other time when, due to insufficient light or unfavorable atmospheric conditions, persons and vehicles are not clearly discernible on a straight, level, unlighted highway at a distance of 1,000 feet ahead.

811.405. Failure to signal with lights; exceptions; penalty. (1) A person commits the offense of failure to signal with lights when required if a person is operating a vehicle and does not use the vehicle lighting equipment described under ORS 811.395 to signal when turning, changing lanes, stopping or suddenly

decelerating under any of following circumstances:

(a) During limited visibility conditions.

(b) At any time the person is operating a vehicle or combination of vehicles in which the distance from the center of the top of the steering post to the left outside limit of the body, cab or load of the vehicle is greater than 24 inches.

(c) At any time the person is operating a vehicle or combination of vehicles in which the distance from the center of the top of the steering post to the rear limit of the body or load is greater than 14 feet.

(2) This section does not require the driver of a moped or bicycle that is not equipped with lighting equipment to use lighting equipment when required by this

section. A driver of such moped or bicycle shall signal by means of appropriate hand and arm signals described under ORS 811.395 without violation of this section.

(3) The offense described in this section, failure to signal with lights when required, is a Class C traffic infraction.

813.010 Driving under the influence of intoxicants; penalty. (1) A person commits the offense of driving while under the influence of intoxicants if the person drives a vehicle while the person:

(a) Has .08 percent or more by weight of alcohol in the blood of the person as shown by chemical analysis of the breath or blood of the person made under ORS 813.100, 813.140 or 813.150;

(b) Is under the influence of intoxicating liquor or a controlled substances; or

(c) Is under the influence of intoxicating liquor and a controlled substance.

(2) A person convicted of the offense described in this section is subject to ORS 813.020 in addition to this section.

(3) The offense described in this section, driving while under the influence of intoxicants, is a Class A misdemeanor and is applicable upon any premises open to the public.

APPENDIX G

Oregon Revised Statutes

133.235 Arrest by a peace officer; procedure. (1) A peace officer may arrest a person for an offense under ORS 133.005 to 133.045, 133.075, 133.100 to 133.340 and 133.450 to 133.475, at any hour of any day or night.

(2) A peace officer may arrest a person for an offense, pursuant to ORS 133.310 (1), whether or not such offense was committed within the geographical area of such peace officer's employment, and the peace officer may make such arrest within the state, regardless of the situs of the offense.

(3) The officer shall inform the person to be arrested of the officer's authority and reason for the arrest, and, if the arrest is under a warrant, shall show the warrant, unless the officer

encounters physical resistance, flight or other factors rendering this procedure impracticable, in which case the arresting officer shall inform the arrested person and show the warrant, if any, as soon as practicable.

(4) In order to make an arrest, a peace officer may use physical force as justifiable under ORS 161.235, 161.239 and 161.245.

(5) In order to make an arrest, a peace officer may enter premises in which the officer has probable cause to believe the person to be arrested to be present.

(6) If after giving notice of the officer's identity, authority and purpose, the officer is not admitted, the officer may enter the premises, and by a breaking, if necessary.

133.310 Authority of officer to arrest without warrant. (1) A peace

officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed any of the following:

(a) A felony.

(b) A Class A misdemeanor.

(c) An unclassified offense for which the maximum penalty allowed by law is equal to or greater than the maximum penalty allowed for a Class A misdemeanor.

(d) Reckless driving under ORS 811.140.

(e) Driving while under the influence of intoxicants under ORS 813.010.

(f) Failure to perform the duties of a driver under ORS 811.700 or 811.705.

(g) Criminal driving while suspended or revoked or in violation of a hardship or probationary permit under ORS 811.182.

(h) Fleeing or attempting to elude a police officer under ORS 811.540.

(i) Driving after being declared a habitual offender under ORS 811.185.

(j) Any other offense in the officer's presence except traffic infractions as defined in ORS 153.505 and violations as defined in ORS 161.565.

(2) A peace officer may arrest a person without a warrant when the peace officer is notified by telegraph, telephone, radio or other mode of communication by another peace officer of any state that there exists a duly issued warrant for the arrest of a person within the other peace officer's jurisdiction.

(3) A peace officer shall arrest and take into custody a person without a warrant when the peace officer has probable cause to believe that:

(a) There exists an order issued pursuant to ORS 107.095(1)(c) or (d), 107.716 or 107.718 restraining the person;

(b) A true copy of the order and proof of service on the person has been filed as required in ORS 107.720; and

(c) The peace officer has probable cause to believe that the person to be arrested has violated the terms of that order.

161.235 Use of physical force in making an arrest or in preventing an escape. Except as provided in ORS 161.239, a peace officer is justified in using physical force upon another person only when and to the extent that the peace officer reasonably believes it necessary:

(1) To make an arrest or to prevent the escape from custody of an arrested person unless the peace officer knows that the arrest is unlawful; or

(2) For self-defense or to defend a third person from what the peace officer reasonably believes to be the use or

imminent use of physical force while making or attempting to make an arrest or while preventing or attempting to prevent an escape.

161.239 Use of deadly physical force in making an arrest or in preventing an escape. (1) Notwithstanding the provisions of ORS 161.235, a peace officer may use deadly physical force only when the peace officer reasonably believes that:

(a) The crime committed by the person was a felony or an attempt to commit a felony involving the use or threatened imminent use of physical force against a person; or

(b) The crime committed by the person was kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or

(c) Regardless of the particular offense which is the subject of the arrest

or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from the use of threatened imminent use of deadly physical force; or

(d) The crime committed by the person was a felony or an attempt to commit a felony and under the totality of the circumstances existing at the time and place, the use of such force is necessary; or

(e) The officer's life or personal safety is endangered in the particular circumstances involved.

(2) Nothing in subsection (1) of this section constitutes justification for reckless or criminally negligent conduct by a peace officer amounting to an offense against or with respect to innocent persons whom the peace officer is not seeking to arrest or retain in custody.

161.245 "Reasonable belief" described; status of unlawful arrest. (1) For the purposes of ORS 161.235 and 161.239, a reasonable belief that a person has committed an offense means a reasonable belief in facts or circumstances which if true would in law constitute an offense. If the believed facts or circumstances would not in law constitute an offense, an erroneous though not unreasonable belief that the law is otherwise does not render justifiable the use of force to make an arrest or to prevent an escape from custody.

(2) A peace officer who is making an arrest is justified in using the physical force prescribed in ORS 161.235 and 161.239 unless the arrest is unlawful and is known by the officer to be unlawful.

AFFIDAVIT OF FILING

STATE OF OREGON)
) ss.
County of Multnomah)

I, Richard A. Braman, am the counsel of record for petitioners and am a member of the Bar of this Court. To my knowledge, the petition for review in this case was filed by depositing in the United States post office, at Portland, Oregon, on Tuesday, April 4, 1989, forty (40) copies of the petition, with first-class postage prepaid, properly addressed to the Clerk of this Court, within the permitted time.

Richard A. Braman

SUBSCRIBED AND SWORN TO before me this 31 day of March, 1989.

Susan J. Dorn
SUSAN J. DORN
NOTARY PUBLIC — OREGON
My Commission Expires 7/27/91

CERTIFICATE OF SERVICE

I, Richard A. Braman, certify that I am a member of the Bar of this Court and am counsel of record for petitioners in this case. I hereby certify that service was made on respondent by depositing three (3) copies of this petition in the United States post office, at Portland, Oregon, on Tuesday, April 4, 1989, with first-class postage prepaid, properly addressed to respondent's counsel of record, respectively, in the court of appeals and in the district court:

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88-1680

Supreme Court, U.S.
FILED
JUL 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

RIKKI VENEMON, CAROLINE CRAWFORD, THOMAS KEATING, MICHAEL BARNES, THOMAS HUFF, ROBERT BAXTER, and THE CITY OF PORTLAND, OREGON,

Petitioners,

v.

HARRY LOUIS DAVISON,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Where police in effecting an arrest for a traffic infraction did not need to use force but nonetheless threatened to put the citizens' "face in the concrete", grabbed him by the throat without warning from behind, twisted his arm behind him, threw him to the sidewalk, pushed his face to the sidewalk, pulled his hair, and kicked him in the side, must the citizen allege in addition to these acts that he suffered substantial injuries as a result of these attacks to state a claim for relief under 42 U.S.C. § 1983 ("§ 1983")?

2. Should the Court overrule the portion of Monroe v. Pape, 365 U.S. 167 (1961), which affirms the settled statutory interpretation of this Court defining "under color of" law as including actions constituting an abuse of authority, when the consequence of such a

decision would be to deny victims of such abuses of power a federal forum under § 1983?

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Monroe v. Pape, 365 U.S. 167 (1961) . . . 1, 11, 17, 19, 21-25, 27-31

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STATEMENT OF THE CASE

On the evening of September 3, 1984, Mr. Davison left a restaurant bar in downtown Portland, Oregon and walked to his parked car. As he reached for his car door, he saw petitioner Venemon stopped at the intersection in her patrol car. The two made eye contact. Mr. Davison got into his car and drove away, making two legal left hand turns. When Mr. Davison made a right turn he used a hand signal as state law requires because his car's right turn indicator was not functioning. Officer Venemon pulled him over to the curb on the stated grounds that "We don't use hand signals in this town after dark."

Officer Venemon demanded that Mr. Davison remove his driver's license from his wallet and show it to her. He did so. She next demanded that he step out of his car and move to the sidewalk. He did so. She further demanded that he

perform a series of sobriety tests, but he protested that he had only had a couple of drinks over a five-hour period and that this was really not necessary.

Mr. Davison was upset and frustrated with the situation and tried to reason with officer Venemon rather than performing the tests. She then announced that he was under arrest for driving while intoxicated. He protested that he was stone sober and that what she was doing was not right. She demanded that Mr. Davison put his hands behind his back because she was going to handcuff him. Mr. Davison reiterated that he had done nothing wrong, that we was stone sober, and replied that it was not necessary for officer Venemon to subject him to this sort of treatment.

"You'll do it my way or you'll find your face in the concrete", officer

Venemon said, moving to the patrol car to request the presence of more officers.

Mr. Davison never advanced toward Officer Venemon. He never made any physical gestures in the direction of officer Venemon. He made no move to flee toward his car or in any other direction. He did not realize any other officers had arrived on the scene; certainly none spoke to him. Suddenly, he felt an arm reach around his throat from behind him, and someone grabbing his arm and twisting it behind his back. The officer or officers threw him to the sidewalk, pulled his hair, and shoved his face into the concrete. Someone kicked him in the side. He was gasping for air. He first became aware that the perpetrators of this violence were other police officers when he felt his hands being twisted behind him and manacled. By the time he was lifted from his facedown position on the sidewalk

and pitched into the rear of officer Venemon's patrol car, he was sobbing.

At a local police precinct, Mr. Davison took two breathalyzer tests. Each registered a 0.00 blood alcohol level. He was nonetheless held at the police station for an hour. Before leaving, the officers cited him for resisting arrest (a charge for which he was never convicted) and failing to signal with lights (for which he was). Upon his release from the police station, Mr. Davison went directly to the emergency room of first one hospital then another, where he requested further blood alcohol testing and was administered valium for pain in his neck, wrists and in the back of his head.

Mr. Davison then sued petitioners in the United States District Court for the District of Oregon under § 1983 alleging that petitioners violated several

primarily Fourth Amendment rights made applicable to states through the due process clause of the Fourteenth Amendment to the United States Constitution, including the right to be free from excessive force.

The statements in pages 11-12 of the petition for certiorari as to jurisdiction and the trial and appeals court orders are otherwise correct.

SUMMARY OF ARGUMENT

The Court should not grant certiorari in this case to decide either question petitioners pose. Respondent's § 1983 claim relies upon the Fourth Amendment to the United States Constitution made applicable to state action through the due process of law clause of the Fourteenth Amendment and not, as petitioners assert, upon the due process clause alone. The relevant rule regarding Fourth Amendment cases is not in

doubt: if a seizure is unreasonable, it is unconstitutional. Reasonability is an issue of fact for jury determination based on carefully balancing the individual and governmental interests at stake under the facts and circumstances of each particular case. The concept of reasonableness is not amenable to a bright line interpretation as petitioners suggest and urge. The Ninth Circuit appropriately remanded the issue of the reasonability of the force used in respondent's arrest for a factual determination. The Court should thus deny petitioners' request for a writ of certiorari as to the first question they present.

Petitioners also urge the Court to overrule this Court's settled statutory interpretation of the phrase "under color of" law found in Monroe and its predecessors and progeny. Petitioners make this request on the basis of policy

considerations better addressed to Congress, which has knowingly chosen to acquiesce in this Court's interpretation of this phrase for 48 years. The arguments propounded for ignoring the doctrine of stare decisis in this case do not satisfy the test this Court recently set forth in Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) for determining when a court may properly depart from precedent. The Court should thus deny petitioners' request for a writ of certiorari to consider petitioner's second question as well.

REASONS FOR DENYING THE WRIT

A. Under the clear standard this Court has recently articulated, determining whether a Fourth Amendment excessive force claim will lie under § 1983 in this case turns on questions of fact appropriate for jury determination and not for decision by summary judgment.

Graham v. Connor, 57 U.S.L.W. 4513 (May 15, 1989), established the constitutional standard governing a free

citizen's claim that police officers used excessive force in arresting him. This Court held that such claims are properly analyzed under the Fourth Amendment's "objective reasonableness" standard rather than under a substantive due process standard, specifically rejecting the four-part test of Rutherford v. City of Berkeley, 780 F.2d 1444 (2d Cir. 1973), cited by petitioners as controlling:

> Today we * * * hold that all claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process approach.
>
> * * *
>
> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of the "'nature and quality of the intrusion on the individual's Fourth Amendment interests'"

> against the countervailing governmental interests at stake.
>
> * * *
>
> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. Its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.
>
> * * *
>
> As in other Fourth Amendment contexts, * * * , the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Id. at 4516 (citations omitted, emphasis in original).

This test of "unreasonableness" under all the facts and circumstances is clearly not amendable to imposition of the bright line rule -- petitioners urge -- that no force is excessive in an arrest situation unless it causes "severe" or "substantial" injuries. Applying the case-by-case analysis of Graham to the facts of this case, then, makes clear that the allegations in respondent's complaint state at least several issues of fact appropriate for jury determination.

The severity of the "crime" -- a misdemeanor traffic infraction -- for which respondent was arrested was minor. He was neither actively resisting arrest nor attempting to flee the scene. Unarmed and unthreatening, respondent posed no danger to the safety of the police officers, and no one else was present. Under the circumstances, no force was necessary -- or so a jury could certainly

find -- and such force as petitioners actually used was brutally excessive. Indeed, Oregon courts have held that where an officer encounters only passive resistance, his or her authority to use force to effect an arrest is diminished substantially. State v. Jordan, 38 Or. App. 421, 424, 591 P.2d 431 (1979); see also Stevens v. City of St. Helens, 231 Or. 1, 6, 371 P.2d 686 (1962). The Ninth Circuit appropriately reversed the District Court on this issue.

Petitioners cite an Oregon statute as authority for the principle that "the privilege to arrest carries with it the privilege to use such force as may reasonably be necessary to accomplish the arrest" (Pet. 15), but this merely restates the same general test of reasonableness as the foregoing, again presenting a factual matter for jury determination and not for reversal of the

Ninth Circuit's ruling. This Court should thus deny petitioner's request for a writ of certiorari to consider the first question they have presented.

B. Monroe correctly holds that misuse of power granted by state law constitutes action taken under color of state law, and petitioners have not shown the special justification necessary to overturn this ruling.

Monroe v. Pape, 365 U.S. 167 (1961) reaffirmed the holdings in U.S. v. Classic, 313 U.S. 299 (1941) and Screws v. U.S., 325 U.S. 91 (1945) that "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law." Monroe, supra at 184.

Petitioners say "experience" has shown that this Court incorrectly interpreted the term "under color of" law in Monroe (and thus presumably in Classic and Screws as well), and urge that it now overrule that decision on policy grounds.

Petitioners' argument boils down to the following: plaintiffs should have to exhaust their state remedies before bringing a § 1983 action to avoid crowding the federal docket and "subject[ing] * * * local governments * * * to scrutiny under the federal Constitution".[1] (Pet. 29) If

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[1]Petitioners may be attempting to apply due process analysis to violations here of the Fourth Amendment, but if so, they err. See discussion, Daniels v. Williams, 474 U.S. 327, 337-339 (1985) (Stevens, J. concurring), Robins v. Harum, 773 F.2d 1004, 1009 (9th Cir. 1985) ("the Parratt [due process] analysis is not applicable to a claim, such as the instant excessive use of force claim, brought under the Fourth Amendment"). Petitioners cite several cases for the proposition that this Court believes federal jurisdiction of § 1983 suits in general are trivializing the Constitution, e.g., Daniels v. Williams, id., Parratt v. Taylor, 451 U.S. 527 (1981), Baker v. McCollan, 443 U.S. 137 (1978), and Paul v. Davis, 424 U.S. 693 (1976), but all of these cases deal with various plaintiffs' attempts through § 1983 actions to expand the sweep of due process protection to encompass mere tort claims -- problems not applicable to this case, which involves Bill of Rights violations. Petitioners suggest that the State of Oregon offers protections of individual rights equivalent to federal protections without specifying what these protections might be. As a practical matter, it makes

this Court rejects the longstanding definition of "under the color of" law to substitute a threshhold that encompasses only actions in which state government officials acted consistently with state law, federal court caseloads and constitutional scrutiny of local officials will diminish. Therefore, they argue, this Court should grant certiorari to overrule the holding in Monroe that actions abusing power granted by state law constitute actions taken "under color of" state law.

Petitioners are not the first litigants to request on policy grounds

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no difference whether petitioner means these remarks to aid a due process analysis inappropriate to this claim, or to support a plea for requiring exhaustion of remedies. A successful attempt under either approach would result in a decision that if respondent has an adequate state remedy he is outside the scope of § 1983 protection. The practical result of any such decision would be to require respondent to exhaust adequate state remedies before bringing this § 1983 action in federal court, or to lose in that forum.

that this Court impose a requirement that plaintiffs exhaust their state judicial or administrative remedies before bringing a § 1983 action. Noting that "this Court has stated categorically that exhaustion [of administrative remedies] is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since McNeese v. Board of Education, 373 U.S. 668 (1963)," this Court in Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) added:

> Respondent and the Court of Appeals argue that exhaustion of administrative remedies should be required because it would further various policies. They argue than an exhaustion requirement would lessen the perceived burdens that § 1983 actions impose on federal courts * * * [P]olicy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent * * * The very difficulty of these policy considerations, and Congress' superior institutional competence to

> pursue this debate, suggest that legislative not judicial solutions are preferable. Id. at 512-513

Before Patsy, Monroe held that a plaintiff need not exhaust state judicial remedies to bring a civil rights action in federal court.

> It is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence, the fact that Illinois by its constitution outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court." Id., at 183 (cited with approval in Patsy, Ibid. at 181)[2].

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[2]See also Steffel v. Thompson, 415 U.S. 452 (1974) (after exhaustive analysis of the legislative history of § 1983, the Court noted the primacy of the federal courts in protecting constitutional and other federal rights and ruled that the § 1983 plaintiffs did not need to exhaust state judicial or administrative remedies before suing in federal court).

Petitioners have not attacked the portion of the Monroe decision quoted above.

Petitioners seek to distinguish their case from others where exhaustion was not required by characterizing the State of Oregon, presumably unlike other states, as "ready, willing and able" to enforce the constitutional rights of its citizens. This is specious. To suggest that a government body has ever stood before a court claiming anything else strains credulity. This Court has held for over 25 years that a plaintiff need not exhaust available state judicial or administrative remedies before bringing an action under § 1983. Surely Congress is aware of this judicial interpretation and has chosen not to amend the statute to reflect petitioner's desired interpretation. Its silence must thus be considered approval of the status quo.

Neither are petitioners the first litigants to request this Court to overturn precedent and adopt a definition of "under color of" law different from that of Monroe on policy grounds. Monroe itself notes that after this Court defined the term "under color of" law in Classic, supra, government officials urged the Court to change that definition in ruling on Screws and again in ruling on Monroe.

> It was urged [in Screws] as it is here, that "under color of" state law should not be construed to duplicate in federal law what was an offense under state law. It was said there, as it is here, that the ruling in the Classic case as to the meaning of "under color of" state law was not in focus and was ill-advised. It was argued there, as it is here, that "under color of" state law included only action taken by officials pursuant to state law. We rejected that view. Id. at 184.

The Monroe Court then noted that the construction given the statute in Classic formulated a rule of law which had become the basis of federal enforcement in the important area of civil liberties.

> The rule adopted in that case was formulated after mature decision. * * * We do not have here a situation * * * where we overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The Classic case * * * was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout history of the Court have wisely remained flexible and subject to frequent re-examination. The meaning which the Classic case gave to the phrase 'under color of any law' involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of [the statute] to meet the exigencies of each case coming before us.

Monroe at 184-185, citing Screws at 112-113.

Monroe noted that Congressional activity in the 20 years intervening between Classic and Monroe would, if anything, buttress the view that Congress supported the Court's interpretation. "If the results of our construction of under color of law were as horrendous as now claimed" said the Court, "surely the voice of the opposition would have been heard [in Congress]." Monroe at 187. Forty-eight years have now passed since Classic was decided, and the above rings that much truer for the longer knell.

While courts do sometimes abandon precedent, this Court has made clear that this is not an action to be undertaken lightly.

> The Court has said often and with great emphasis that "the doctrine of stare decisis is of fundamental importance to the rule of law." Although we have cautioned that "stare

decisis is a principle of policy and not a mechanical formula of adherence to the latest decision," it is indisputable that stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon "an arbitrary discretion."

Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. Nonetheless, we have held that "any departure from the doctrine of stare decisis demands special justification." We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.

Patterson v. McLean Credit Union, 57 U.S.L.W. 4705, 4707 (June 15, 1989) (citations omitted).

The Patterson Court went on to describe what situations might present the kind of "special justification" needed to overturn a statutory precedent like Monroe.

> In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such changes have removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, the Court has not hesitated to overrule an earlier decision * * * .
>
> Another traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or

> because the decision poses a direct obstacle to the realization of important objectives embodied in other laws * * * .
>
> Finally, it has sometimes been said that a precedent becomes more vulnerable as it becomes outdated and after being "'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.'"

Patterson, supra, at 4707.

Applying this analysis to Monroe makes it clear that the holding of Monroe as to the meaning of the term "under color of" law should stand. The development of the law in the intervening 48 years since Classic has only affirmed that the Court and the Congress approve of the "misuse of power" standard enunciated there and reiterated in Monroe. The Court in Monroe undertook an exhaustive analysis of the legislative history to arrive at its decision that the Classic definition furthered the legislative intent of the statute. This history, of course, has not

changed. Thus, the conceptual underpinnings of the decision are as sound today as they were the day Monroe was written.

Rather than contributing to confusion, Monroe has contributed to coherence and an ability of all parties to rely on a settled conclusion as to what the term "under color of" law means. Monroe is certainly consistent with the intuitive public sense of justice that would find it odd to be able to sue police officers or other government officials for doing their jobs properly, but not for abusing the authority of their offices. Clearly, no "special justification" exists for overruling Monroe under the Patterson test.

The cases petitioners cite to show the "flexibility" of the doctrine of stare decisis do not contradict the above analysis or result. In Hertz v. Woodman,

218 U.S. 205 (1910), the Court appeared to depart from prior decisions but explained that because these decisions were affirmances by an equally divided Court of the judgments of the courts below, they had no precedential value and hence did not violate the doctrine of stare decisis. In Helvering v. Hallock, 309 U.S. 106, 119 (1940), a tax code case, the Court noted that it was overturning precedent because of the difficulties which lower courts had found in applying the distinctions made by these cases and the seeming disharmony of their results. Id. at 110. It defined its problem as being "to determine whether we are to adhere to a harmonizing principle * * * or * * * to multiply gossamer distinctions between the present cases and the three earlier ones", Id. at 118, and "not that of rejecting a settled statutory construction," Id. at 122. None of these factors are present in Monroe to

militate against preserving its settled interpretation.

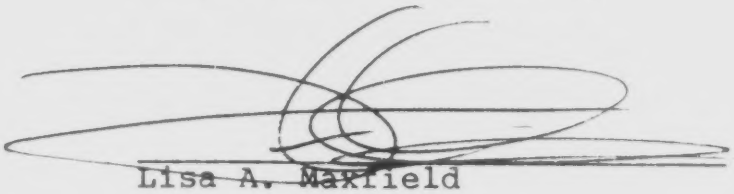
As the foregoing makes clear, Monroe articulated a sound doctrine based on the legislative intent of the statute and multiple judicial precedents from this Court. Congress has accepted these precedents with a silence implying approval for 48 years though as Monroe indicates it has been presented with multiple opportunities to amend the statute to do away with the legacy of Monroe and its predecessors. Petitioners have shown no special justification required to overrule such a settled statutory interpretation. This Court should thus DENY the writ and allow Monroe to stand.

CONCLUSION

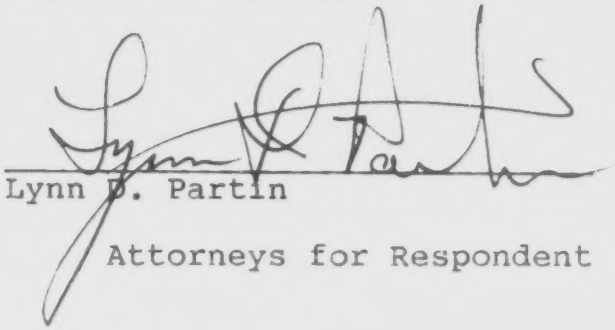
The Court should deny the petition for a writ of certiorari on both questions presented. The Court should affirm the

judgment of the Ninth Circuit and should reverse the judgment of the District Court.

Respectfully submitted,



Lisa A. Maxfield
Counsel of Record



Lynn D. Partin

Attorneys for Respondent

AFFIDAVIT OF FILING

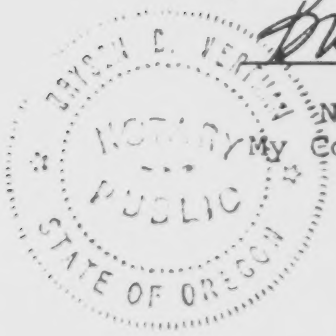
STATE OF OREGON)
) ss.
COUNTY OF MULTNOMAH)

I, Lisa A. Maxfield, am the counsel of record for respondent and am a member of the Bar of this Court. To my knowledge, the petition for certiorari in this case was filed by depositing in the United States Post Office at Portland, Oregon on Friday, July 7, 1989, forty copies of the petition, properly addressed to the Clerk of this Court, within the permitted time.

Lisa A. Maxfield

Subscribed and Sworn to before me this 5th day of July, 1989.

Bryson C. Wertman
Notary Public for Oregon
My Commission Expires: 1-18-92



CERTIFICATE OF SERVICE

I, Lisa A. Maxfield, certify that I am a member of the Bar of this Court and am counsel of record for respondent in this case. I further certify that service was made on the petitioners by depositing three copies of this petition in the United States Post Office at Portland, Oregon, on Friday, July 7, 1989, with first-class postage prepaid, addressed to petitioner's counsel of record in the court of appeals and district court actions:

Richard A. Braman
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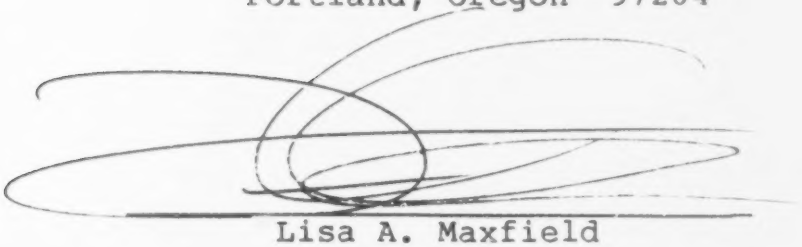

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